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EXECUTION OF SENTENCES BY THE INTERNATIONAL COURT OF JUSTICE AND SECURITY COUNCIL

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Abstract: The situation of the war in Ukraine, the appealed for precautionary measures and the related order allow us to investigate from scratch the international debate relating to the execution of the sentences of the International Court of Justice, the role of the Security Council as well as the possibility for a related reform. In this area the Charter of the United Nations and the discussion of the veto shows that the situation is difficult from a legal and political point of view due to the relative veto on the part of the Security Council.

Keywords: ICJ; Ukraine crisis; Security Council; right of veto; Charter of the United Nations; art. 94; par. 2 of the Charter of the UN; prospects for reform of the UN; precautionary measures.

INTRODUCTION

The enforcement of judgments of the International Court of Justice (ICJ) has been a topic of international debate for years in the case of non-compliance as we saw in Germany v. Italy (Trapp, Mills, 2012; Klinzing, 2014; Liakopoulos, 2020)[1] and in cases of precautionary measures. What still interests us given the situation of the Ukrainian crisis are the precautionary measures against Russia that were requested by Ukraine as well as the role of the UN Security Council in this sector.

Referring to precautionary measures we mean the solution of any type of dispute (ex alterius commission alicuius causae recepit iudicialem missionem) (Salaza, Manuel,

[1]ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 3 March 2012.

2017). They have a supplementary nature and respect full the knowledge which is exhaustive for internal judicial protection systems. Judicial intervention at the procedural level and in relation to that of substantive law places dual functions of a technical-legal but also of political nature in the hands of the international judge (Henry, 1977). This power of the judge is a phenomenon that oscillates between inflation in sectors where inactivity in the common and civil law systems consists of a combination that allows jurisprudence to have certain effects on the law over time, both repealing and retroactive (èdict, loy, expresse, publièe, verifièe, enregistrèe) (Perelman, 1968).

The ICJ has its own jurisdiction, i.e. the ability, suitability to resolve a dispute through a final ruling which should be respected. The competence is precise and specific also in the titles that determine the prevailing ones, considered as the qualified activities, a jurisdiction in the strict sense, where the ICJ, a super partes body, seeks not only to establish a trial but also to resolve a dispute through an agreement of the parties in litigation or through precautionary measures. Resolution of a dispute also means entering into the merits of a conflict. That is, of certainty

and respect for the law (certitude and lègalitè) as a balance that leads to hypotheses of possible solutions and where the absolute nullity of an act produces ipso iure effects and definitive validity tout court. This means that, we distinguish between legitimation ad processum and legitimization ad causam. On the one hand, it occurs that the actor asserts the right to exercise and provide the representative power of each beneficial owner. Legitimatio ad causam consists in exercising a right in court that is independent of the ownership of the right and/or by chance, the ownership entrusted not to the availability of the parties but also to the political will of the international community.

PRECAUTIONARY MEASURES AGAINST RUSSIA

On 24 February 2022, Ukraine requested precautionary measures from the ICJ accusing the Russian invasion of committing genocide in the Donetsk and Lugansk areas. Russian President Putin at the same time referred to the horror of the genocide of around four million people in the

Donbass region[2]. Perhaps the reference was the justification of the reasons that the military invasion was decided and that it was legal through Art. 51 of the UN Charter (Pellet, 2014), to protect people who are subject to abuses and acts of genocide by Kiev as well as ongoing genocide crimes (Azarov, Koval, Nuridzhanian, Venher, 2023)[3].

To request precautionary measures, Ukraine relied on the New York Convention, the prevention and repression of the crime of genocide and above all on the arbitration clause of Article IX[4]. This convention had no connection with armed aggression and the consensual nature of international

[2]"(...) Russia does not want war (...) calls Donbass "genocide" (...)" in Reuters, 15 February 2022: https://www.reuters.com/world/europe/putin-says-russia-does-not-want-war-calls-donbass-genocide-2022-02-15/

[3]See the Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Provisional Measures, 16 March 2022, parr. 38 and 39.

[4]"(...) disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute (...)".

jurisdiction as well as with Art. IX but it was formal and brought the Russian federation before the ICJ.

The interpretation on the side of Ukraine was very broad and generic for being based on the genocide convention and perhaps it was decided in the moment of panic drawing the attention of the international community to the atrocities that were going on in the area since 2014. According to Ukraine, the Russian Federation has falsified and accused the Ukrainian army of committing acts of genocide against the pro-Russian populations of Donetsk and Luhansk. As a consequence, a dispute was created between Russia and Ukraine over the application and interpretation of the genocide convention as indicated in Art. IX. The judgment could indirectly determine the illicit and illegal nature of Russian conduct and the measures adopted are justified for the Ukrainian genocide (Milanovic, 2022).

Ukraine asked the court to declare the truth and not deny that it commits these types of crimes but the Russian Federation declared in practice that the defendant state was not entitled to carry out actions at the specific moment given that no international crime was committed. The

Ukrainian state relied on Art. 41 of the Statute of the ICJ (Zimmermann, Tams, Oellers-Fraham, 2019) and adopted provisional measures for the suspension of all types of military actions that began by the Russian federation on 24 February 2022 (Wolfrum, 2006)[5].

THE COURT ORDER

In practice, Ukraine obtained with an order of 16 March 2022 against the Russian Federation to:

> "(...) immediately suspend the military operation that it commenced on 24 February 2022 in the territory of Ukraine (...) ensure that any military or irregular armed units which may be directed or supported by it, as well as any organization and person which may be subject to its control or direction, take no steps in furtherance of the military operation (...)"[6].

[5]Which is declared that: "(...) 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council (...)".

[6]Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide, op. cit., par. 86(1).

This order was based on the existence of requirements to act in a precautionary and prima facie manner in one's jurisdiction. The ICJ had to affirm the fumus boni iuris, i.e. the interpretation of the relevant rules, the existence of a link between the requested measures and the related protection as well as the periculum in mora, i.e. the continuous risk and related prejudice of an irreparable nature for the right that sought protection.

The ICJ was based on the existence of a very complex dispute between two states for primarily political and then legal reasons. The applicability of entering the scope of the convention against genocide was also difficult. As was obvious, Russia denied the existence of a dispute between two states concerning the interpretation, application and implementation of the genocide convention. For the Russian Federation it was only a special military operation based on Art. 51 of the UN Chapter (Pellet, 2014) and on customary international law. The ICJ sought to examine statements given to Russian officials and President Putin himself, concluding the true and precise existence of an interstate dispute.

According to Art. 41 of the Statute of the UN the existence

of a connection between the rights, protection and measures invoked was necessary. The rights invoked should be plausible so as not to

> "suffer a false accusation of genocide (...) not to suffer an armed attack on its territory based on an abuse of Art. I of the Convention (...)" (Lando, 2018).

For the ICJ it was sufficient to adhere to an interpretation that was proposed by Ukraine and according to which the contracting parties had to take into consideration and practice the obligation to prevent, punish genocide in good faith as well as the provisions of the convention and particularly of Articles VIII and IX, as also noted in the preamble. This implies that states in fulfilling their obligation must use the tools that are offered by the convention. It was necessary to decide on the use of every legal and political means to remain within the limits of international law and with respect to the object of the UN Charter which have to do with the maintenance of peace, international security and waiver for acts of aggression and violations of the peace.

Therefore, the ICJ found no doubts about the convention, its objectives as well as the authorization of unilateral uses

of force by one state against another to prevent the commission of acts of genocide. The right that was invoked by Ukraine for military operations by the Russian federation was plausible (Milanovic, 2022).

The relative imminent danger of serious irreparable harm as stated by the ICJ and the related approach to risks to the life of the population as well as the risk of injury in re ipsa are linked to harm to the civilian population which has been affected by numerous casualties and injuries among civilians causing damage, including material damage, as well as the destruction of buildings and infrastructures[7].

In this case the ICJ took a risk through the Resolution of 2 March 2022 of the General Assembly[8] which brought Russian conduct and acts of aggression to the discussion table, thus expressing concerns about attacks on civilians and the vulnerable situation in which found the Ukrainian population (Milles, 2017)[9].

[7]Allegations of Genocide, op. cit., par. 75.

[8]General Assembly, Aggression against Ukraine, A/RES/ES-11/1, adopted on 2 March 2022.

[9]General Assembly, Aggression against Ukraine, A/RES/ES-11/1, op. cit., par. 76: "(...) on the one hand, the human element may compel intervention by the court or tribunal; on the other, the consent-based

ARTICLE 94, PAR. 2 OF THE UN CHARTER

We refer to Art. 94 of the UN Charter (Pellet, 2014; Aledo, 2021; Alland, 2021) in relation to the power of the Security Council (SC) (Marc De La Sablière, 2018) when a sentence exists and orders of provisional measures are included. Executing the sentences of the ICJ burdens the Member States despite the fact that Art. 94, par. 1 of the UN Charter (Aledo, 2021) undertakes to comply in disputes between states that are part of the Council.

Its obligatory nature is a reproduction of general international law (Higgins, Webb, Akande, Sivakumaran, Sloan, 2018) that recognizes its specialty and non-generic nature (Vulcan, 1947). The function of the rule is the same and the binding enforcement of the sentence fulfills the obligation of all Member States of the UN. This is a case of chance. However, it is considered that the ICJ does not exercise control over the execution of decisions and the spontaneous cooperation of the losing party.

This type of cooperation is noted when a favorable ruling

character of international jurisdiction may mean that such an injunction may be seen as illegitimate (..)".

by the ICJ provides the means for its compliance. Then trying to adopt countermeasures, to provoke the action of the Council according to Art. 94, par. 2 of the UN Charter, benefiting thus from the intervention of a regional or international organization and attributing the relevant powers in a conventional way.

Therefore, Art. 94, par. 2 of the UN Charter does not apply when a state fails to fulfill its obligations under a ruling of the ICJ. However, it has the right to appeal to the SC as a right necessary to make recommendations and decide for the sentence to be executed.

It is a circle that limits its application under two distinct profiles. The procedure refers exclusively to the state where the sentence is favorable to a possibility precluded to the SC and which cannot act proprio motu[10] as well as to third states that respect the dispute.

The SC does not accept the request for the relevant

[10]Art. 94, par. 2 of the Charter of the UN is different from Art. 13, par. 4 of the Covenant of the League of Nations, which reported the non-execution of the sentence and the Council proposed the measures necessary for its effect. For the Council the burden was based on the obligation to intervene.

intervention which was presented by the victorious state, thus finding a wide space of discretion and deciding to act according to the recommendations that guarantee the execution of the same sentence of the ICJ.

Art. 94, par. 2 which refers to the term judgment respects in an active and exclusive manner the act and form of the sentence (Oellers-Frahm, 2012). The term judgment is interpreted in the material and non-formal sense, thus also including precautionary orders. This conclusion is the result of their mandatory nature (Heinlein, 2010)[11] according to Art. 41, par. 2 of the statute of the UN.

The ICJ, pending the final decision, should give the relevant information to the SC for the relevant orders that are proposed. If we interpret the term judgment in the non-formal but material sense, we mean the orders that have a precautionary nature. The mandatory character, according to the content of Art. 41, par. 2 of the statute of the ICJ, is, therefore, not convincing.

The practice so far does not show the existence of a power to the SC, which Art. 94, par. 2 is invoked, according to the

[11]ICJ, Germany v. United States of 27 July 2001, in ICJ Reports, 2001, par. 92-116.

guarantee and execution of an order of the ICJ, which intervenes on an action of this rule (Schulte, 2004). The mandatory nature of the ordinances does not have to do with the applicability, which respects all means of execution forced for the sentences. Last but not least, we must take into consideration, that Art. 94, par. 2 (Alland, 2021) concerns sentences that do not include the SC and the possibility that favors the execution of an order, that has use of other powers, such as those deriving from Chapters VI and VII of the UN Charter (Lando, 2015).

WHAT POWERS DOES ART. 94, PAR. 2 OFFER TO THE SECURITY COUNCIL?

Due to the lack of indications in the UN Charter, art. 94, par. 2 provides the measures that the SC can adopt. The procedure in question is circulated within the general powers of the SC. It refers to the maintenance of peace and international security, thus limiting the intervention and the failure to execute a sentence that is in conflict with the general threat to peace in international security (Reisman, 1971).

Art. 94, par. 2 retains an autonomous scope in the system of the UN Chapter and the relative failure of the state constitutes a sufficient prerequisite to justify the Council's action (Tanzi, 1995). In our opinion, this is a rather superfluous position not maintained in practice.

The SC has thus few, diminished powers based on Chapters VI and VII. Any member state of the UN can turn to the SC in the moment of non-execution that is deemed dangerous for international peace and security and the SC deals only with its own initiative.

Failure to execute does not give rise to a lack of peace but perceives that the SC does not have the powers, i.e. recommendations, decisions of Art. 94, par. 2, appeals of the state where the sentences are favorable.

This means that the powers of the SC remain autonomous in this way. A general autonomy of the SC which has as its final objective the international peace and security obtained by the execution of the sentences of the ICJ. The law gives the SC the power of recommendations and decides on appeals from the state where the ruling is favorable. Of course, the different purposes and powers considered do not specify those powers that are conferred

on the SC and the related Chapters VI and VII of the UN Charter.

Article 94, par. 2 has not found full application in practice until now but only functional pressure especially because the intervention of the SC is only possible.

The action of the SC is blocked by the veto right of one of the members who are permanent and is in dispute with another state. The decisions of ex Art. 94, par. 2 concern substantive and procedural issues. Art. 27, par. 3 of the Charter and the rule of decisions of the SC are taken by affirmative the vote of the nine members, including the relevant votes of the permanent members. This is an opinion of missing execution by a member as we have seen in the case of the United States and in the sentence in the matter relating to military and paramilitary activities in and against Nicaragua of 27 June 1986[12]. In this case the veto of the United States rejected the resolution that was proposed by Art. 94, par. 2.

No permanent member is involved and the states ask for

[12]ICJ, Military and paramilitary activities in Nicaragua and against Nicaragua case (Nicaragua v. United States), in ICJ Reports, 1986, par. 14, 24 and 28.

the intervention of the SC as a last resort. In this spirit, we recall the Germany v. Italy case of 2012 relating to the jurisdictional immunities of the state and the denial of enforcement by the Italy[13].

The ruling affirmed the interpretation of the rule relating to the immunity of foreign states from jurisdiction based on acta iure imperii/acta iure gestionis, which is favorable to the recognition of immunity, when acts of this type arise. The law under investigation is suitable to operate in state actions that have to do with international crimes and the consequences according to the ICJ are opposed with internal regulations thus creating a violation of the law and the general obligation to adopt the necessary means to carry it out.

The attitude of cooperation was also noted in the case of Germany who did not turn to the SC despite the fact that it had the conditions to do so, thus diminishing the role of Art. 94, par. 2[14], asking, therefore, for the function that also

[13]ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), op. cit.

[14]According to Oellers-Frahm: "(...) not give a guarantee for the implementation of the judgment because the SC is not obliged to act, but

responds immediately to the repressive function.
The interest in the execution of the sentences of the ICJ receives indirect protection that respects other values for the maintenance of international peace and security, thus privileging and sacrificing the position of the state in case the sentence was favorable.
This type of reasoning concludes with the general interest of the execution of the sentences of the ICJ which has an indirect nature attributed to the procedural execution as stated by Art. 94, par. 2 of the UN Charter and the general interest that constitutes this expression.
We must distinguish between forced and indirect execution, where the credit is realized less by the obligatory behavior and in the case where cooperation is the object of one's own expectation and the threat of a general evil shows that current cooperation does not exist.
Indirect enforcement favors the obligation's compliance by thus pronouncing a condemnation sentence and providing

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has discretion and because the particular mechanism governing the decisions of the SC apply. Thus, Article 94 (2) UN Charter should not be overestimated as a means for executing judgments of the ICJ, in particular if “veto powers”are concerned (...)”.

that the debtor who is in default is required to pay a sum of money. So Art. 94, par. 2 is considered. It is best interpreted through indirect execution since the relative rationale within the Charter is not clear. The possible nature of the SC causes reactions as well as consequences of a prejudicial nature. The SC always has as its objective international peace and world security, reflecting on the preventive repressive nature and the instrument to which the norm has as object[15].

CONCLUDING REMARKS

As we understood from the previous paragraphs, we note that art. 94, par. 2 of the UN Charter needs a reform that should have been going on for a long time now. Even in the case of Russia and Ukraine we showed that the SC' role needs to be reformed. The SC has limited recourse to the execution of the sentences of the ICJ which remains disregarded by the states.

The reform of the SC is a topic that has been going on for many years due to the changing stage of international

[15]See the General Assembly n. A/RES/48/26, adopted 3 December 1993.

society agreeing to a continuous path that has international peace and security as its first objective. Already since 2008 the Inter-Governmental Negotiations (IGN) in the Assembly has laid the foundations for the category of membership in the SC and the question of the veto and regional representation as well as the overall dimension of the SC which has broadened the working methods and relations between the SC and the general assembly.

France has proposed for a future reform of the SC the drafting of a statement of principles where the commitment to the issue of the veto is formalized by intervening to deal with situations that commit international crimes.

The French proposal, in the moment of paralysis of the SC, allowed the Secretary General of the UN to take positions, when violations of fundamental human rights have occurred. This is a role that ensures the possibility of identifying the nature of the crimes, thus attributing to the secretary the relevant tools necessary to lead to the identification of the conditions of the procedure. The basis of this proposal was an act of soft law to find a balance when the veto will abolish the continuation.

Another proposal was put forward by the Uniting for consensus (Ufc) proposed by a group of different regions worldwide. It is a promoter of a reform that ensures the role and objective of the same organization to the SC in a democratic, representative, effective and responsible way, which is international peace and security. Through the extension of the membership by providing 26 seats in total of 9 permanent members distributed across various regional groups essentially consists and is contrary to the UFC of having permanent members who are represented by individual nations.

The reform has as its object the structure of the SC with an inevitable impact on Art. 94, par. 2 of the UN Charter in a concrete way. The measures according to the law have a substantial nature for the adoption of a resolution which is mandatory for the favorable vote of nine members including the permanent ones. A reform on the veto power of states, which determines a different functioning of the Council regarding the execution of sentences coming from the ICJ. An expansion of the countries that are equipped with the veto power is preferable to the proposal, which is not far from the French one, to the countries that are

equipped with the veto power and into consideration of the sector related to the execution of sentences. The proposals are the result of countries having the voting power and continuing to have a precise position over time. Of course, solutions exist but the political will is lacking despite the fact that international practice shows the need for change.
Art. 94, par. 2, of the sentences of the ICJ, is shown to be an indirect execution rather than a non-execution of the sentence. The considerations of the international community respect the role of the SC and the vexed question of a reform that affects the powers that are provided for in art. 94, par. 2. A possible reformulation of the SC, on powers that have to do with ICJ rulings, is necessary, in case the need to adopt the resolution with a favorable vote for the permanent members, is obligatory.
Overall, it is understood that the expansion of the members who are endowed with the power of the veto is preferable to the reduction of the de quo power, through careful discipline that takes into consideration, what is foreseen by Art. 94, par. 2 of the UN Charter. The future will show what direction the veto power will take, i.e. towards limitation or abolition.

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